

(1991) 05 GAU CK 0009

Gauhati High Court

Case No: Second Appeal No. 123 of 1983

On the Death of Appellant
Jatindra Mohan Das, His Heirs
Smti Renu Bala Das

APPELLANT

Vs

Makhan Bala Das

RESPONDENT

Date of Decision: May 18, 1991

Acts Referred:

- Assam Non-Agricultural Urban Areas Tenancy Act, 1955 - Section 3(g), 3(g), 5, 5

Citation: (1991) 2 GLJ 29

Hon'ble Judges: B.P.Saraf, J

Bench: Single Bench

Advocate: N.Chakraborty, D.C.Choudhary, B.R.Dey, B.K.Das, B.Banerjee, S.Dutta,
Advocates appearing for Parties

Judgement

1. This second appeal of the plaintiff is directed against the judgment and decree of the Assistant District Judge No. 2 Cachar, Silchar affirming the judgment and decree passed by the Sadar Munsiff No. 2 dismissing the plaintiff's suit.

2. The facts of the case, briefly stated are as follows : The plaintiff claims to be the owner of the suit land. His case is that he had purchased the same from the heirs of the original owner Kali Kumar Sen. The purchase was made by two registered deeds dated 5. 10. 71 and 15. 12. 75 (Ext. 3 and 4). The original owners by a deed dated 3. 6. 1944 (Ext. 1) had given the suit land on lease to Abdul Khalique and Abdul Jabbar, who in turn, later sold their leasehold right to defendant Nos. 1 and 2. Defendant Nos. 1 and 2 thus became the tenants of the vendor of the plaintiff in respect of the suit land. The proforma defendant Nos. 3 to 7 were subtenants under defendant Nos. 1 and 2. The plaintiff served notice on the defendants to vacate the suit land and on their failure to comply with the same, the suit was filed for eviction and recovery of khas possession,

3. Defendant No. 1 and proforma defendant Nos. 3, 5 and 6 contested the suit. The contention of defendant No. 1 was that she was a tenant under the previous owner and, as such, she was entitled to protection under section 5 of the Assam NonAgricultural Urban Areas Tenancy Act, 1955, hereinafter "the 1955 Act". The other defendants contended that as they were subtenants under the principal defendant Nos. 1 and 2 and were paying rents regularly to them, they were not obliged to vacate the suit land.

4. The trial Court held that the plaintiff had failed to prove his title. It was also held that as the defendant Nos. 1 and 2 had constructed some permanent houses over the suit land within two years from the date of the tenancy (between the period 1944-46, they were not evictable in view of the provisions of section 5 of the 1955 Act.

5. It may be pertinent to mention that during the pendency of this suit, proforma defendant No. 6 died. On his death, his legal representatives were not substituted in his place. The trial Court on that account, held the suit to be bad for nonjoinder of the parties. The suit was also dismissed in view of the aforesaid finding.

6. An appeal was preferred against the said judgment and decree. The appeal was heard by the Assistant District Judge No. 2, Cachar, Silchar. The Assistant District Judge reversed the finding of the trial Court in regard to the title of the plaintiff over the suit land. The Court observed that it was evident from exhibits 3 and 4 that the plaintiff had purchased the suit land from the heirs of the original owner. This fact was also not disputed by the defendants. In that view of the matter, the Assistant District Judge held that the plaintiff had acquired right, title and interest over the suit land by virtue of the purchase. The appellate Court, therefore, reversed the finding of the trial Court on issue No. 5 and decided the same in favour of the plaintiff. As regards the controversy whether the defendants were liable to be evicted or not, the lower appellate Court affirmed the finding of the trial Court and held that they were entitled to protection under section 5 of the 1955 Act and, as such, they were not liable to be evicted. The Assistant District Judge also affirmed the finding of the trial Court regarding the effect of nonsubstitution of the legal representatives of the subtenant proforma defendant No. 6 and held that it was fatal to the suit. In view of those findings, the judgment of the trial Court was affirmed and the appeal was dismissed. The plaintiff has come up in second appeal against this judgment.

7. The following two questions of law were mainly urged by the learned counsel for the appellant :

(1) Whether the finding of the Courts below that the suit was bad for nonjoinder of necessary parties due to the failure of the appellants/ plaintiff to substitute the legal representatives of proforma defendant No. 6, a subtenant who died in course of the trial, is tenable in law.

(2) Whether the Court below were justified in holding that the defendants were entitled to protection under section 5 of the 1955 Act without considering whether the tenancy in question was governed by the provisions of the said Act or not.

8. I may take up the question relating to the nonjoinder first. The undisputed position is that the respondent No. 6 was a subtenant. He was made a party in original suit as a proforma defendant. He died during the pendency of the suit. He left behind some legal representatives who were not substituted in his place. On the other hand, his name was struck off from the list of defendants on the ground that he had left no legal heirs. The net result is nonjoinder of one of the subtenants. The question for consideration is the effect of such nonjoinder. The answer will depend on the determination whether the subtenant is a necessary party. For that purpose we may first consider whether "subtenant" is also a "tenant" for the purpose of the 1955 Act.

9. The expression "tenant" has been defined in section 3 (g) of the 1955 Act to mean "a person who holds land under another person, other than Government and who is, but for a special contract liable to pay rent for that land to the latter, and includes a person who derives his title from a tenant, and a person who continues in possession of any land after termination of his tenancy in respect of that land;"

As a subtenant does not hold land under any contract with the owner thereof, he cannot be regarded as a tenant. A subtenant cannot also be regarded as a person deriving title from a tenant. As observed in *Digamber Kalita vs. Sitnath Chakravarty*, AIR 1960 Assam 35 (at page 36).

"what the words mean is that a person who gets interest which is similar to the interest of a tenant, can be regarded as a person deriving his title from a tenant, but a person who independently gets right under some contract with the tenant himself and thus gets a right subordinate to the right of the tenant, cannot be regarded as one deriving his title from the tenant." It was further observed in *Digambar Kalita* (supra) (at page 36) :

"...On a close reading of the definition of the word "tenant", it will appear that persons who are directly under a contract holding the land have been considered to be tenants, and that persons who derive their title through a tenant, have been regarded as tenants for the purposes of this Act. But, there is a further clause which says that the term "tenant" will also include a person who continues in possession of any land after termination of his tenancy in respect of that land.

It cannot, therefore, be said that a subtenant also, if he continues beyond the expiry of the term of his sublease is a person who continues in possession of the land after the termination of his tenancy. He is a person who continues in possession after the termination of his subtenancy, so far as the lessor is concerned, and cannot be regarded as a person who continues in possession after the termination of his

tenancy. In this view of the matter also the subtenant cannot be regarded as a tenant within the definition of the word "tenant" in this Act; and he is not entitled to protection under section 5 of the Act [Emphasis supplied]

10. The definition of tenant under section 3 (g) also came to be considered in a Full Bench decision of this Court in Bireswar Banerjee vs. Sudhir Ranjan Bose, 1973 Assam Law Reports 15 (A & N). On perusal of the definition, the Court classified the tenants under the 1955 in three categories, namely, contractual tenants, derivative tenants, and statutory tenants. From a reading of the definition of tenant as given in section 3 (g) of the Act in the light of the two decisions of this Court cited above, it is abundantly clear that a subtenant is not a tenant.

11. The next question that falls for determination is whether a subtenant is a necessary party in a suit for eviction of a tenant and whether nonimpleading of a subtenant would be fatal to the suit. This question seems to be squarely answered by a Division Bench decision of this Court in Dudmera Bibi vs. Hari Bhakta Seal, AIR 1970 A & N 115. It was held (at page 116):

"...it is sufficient to state that the sublessees, as they are, and parties who are deriving their right from the defendant No. 1 cannot be considered necessary parties in this suit and the suit would not fail for not impleading them."

It was, therefore, held that the suit would not be defective for not impleading them. In that view of the matter, in the instant case, I am of the opinion that the Court below were not correct in holding the suit bad for non joinder of parties.

12. So far as the next question regarding applicability of the Act to the lease in question is concerned, the submission of the learned counsel for the appellants Mr. 13. K. Das is that this Act has been enacted to regulate in certain respects the relationship between landlord and tenant in respect of nonagricultural lands in the urban areas in the State of Assam. It does not apply to cases of lands with houses thereon. Reference in this connection is made to the preamble and sections 2 and 5 of the Act. Reliance is also placed on a decision of this Court in Hari Shankar Sahu vs. Giridharilal Sarmah, 1989 (2) GLJ 2011 (1989) 2 GLR (NOC) 33.

13. I have carefully considered the submissions of the learned counsel. I have also perused the relevant provisions of the Act and decision of this Court in Hari Shankar (supra). It appears that in Hari Shankar Sahu, on consideration of clause (c) of section 2 and clauses (a), (b), (f) and (g) of section 3 and section 5 of the 1955 Act, this Court came to a categorical finding that section 5 of the 1955 Act, which give protection to a tenant from eviction, would not be attracted in case where lease was for a house which also had some land appurtenant to it and on which, as agreed in terms of the lease between the parties some construction had been raised. It was held section 5 of the 1955 Act would operate only when the tenant makes construction on land of tenancy that is the tenancy created is of "land" and not otherwise. The Court, in that case, also rejected the alternate plea that the contract

of tenancy should be considered and treated as splitted into one for the house and the other for the land appurtenant to the house. In that view of the matter, it was held that in such case, even if the tenant had made construction he was not entitled to any protection of section 5 of the 1955 Act. Law on the point is thus clear. The protection under section 5 is available only in case where the tenancy created is of land and not a house.

14. The counsel for the appellants submitted that in the instant case it is evident from Ext. I which is the agreement of tenancy between the original owners of the suit land and the predecessors in interest of the principal defendants that the original tenancy in the year 1944 was not of land. It was land with residential house and shop constructed thereon including backyard. The counsel submitted that this aspect of the matter which is very relevant for determination of the claim of the tenants to protection from eviction was totally lost sight of by both the Courts below.

15. I have given my careful consideration to the aforesaid submission. I have also heard Mr. B. R. Dey, learned counsel for the respondents. On a careful perusal of the judgments of the Courts below, it appears that both the Courts failed to consider the case from the point of view of the subject matter of the tenancy whether it was land or land with the house with some vacant space appurtenant thereto. It was assumed that the provisions of the Act applied to the tenancy in question and the defendants were entitled to protection of section 5 in view of the fact that they had undertaken some permanent construction within 5 years of the tenancy. This assumption was not correct. It was incumbent on the part of the Courts to examine carefully Ext. I and the evidence of the witnesses and to arrive at a definite finding whether the tenancy in question was of a house with land appurtenant thereto or of land because the protection under section 5, as held by this Court in Hari Shankar Sahu (supra) would be available only in cases where the tenancy is in respect of land and not otherwise.

16. In that view of the matter, I am of the opinion that this case should be remanded to the Court of the Assistant District Judge No.2, Cachar, Silchar for determination of the issue whether the tenancy in question was of land or of land with house thereon and then to decide whether the defendants were entitled to protection from eviction under section 5 of the Act.

17. This appeal is accordingly allowed. The judgment and decree of the Assistant District Judge are set aside. The case is remanded to the Court of the Assistant District Judge No.2. Cachar, Silchar for disposal in accordance with the observations and directions made above. As the case is a very old one. it may be decided as expeditiously as possible, preferably within a period of 6 months.